Tan Chou Me (administrator of the estate of Mek Ke Ek d/o Eh Lai, deceased) v Eh Tiang s/o Eh Chan (representative of the estate of Eh Pit s/o Chau Sook, deceased) & Anor

HIGH COURT (KOTA BHARU) — CIVIL SUIT NO 78 OF 1983
IDRIS J
22 JUNE 2000

Succession *— Will — Bequest — Letters of administration — Inter vivos gift of land — Whether transfer of land was effective — Setting aside grant of representation*

The plaintiff claimed as the sole surviving beneficiary of one EL who was the owner of seven plots of land. The plaintiff claimed that EL had before his death obtained the approval of the state Exco for the transfer of the land to the plaintiff. However no action was taken to effect the transfer. The defendant was the nephew of EL. The defendant claimed that the plaintiff was neither the natural child nor a lawfully adopted child of the deceased. The purported inter vivos gift could not be enforced, as it was untenable in law. A judicial scrutiny of the letters of administration ('LA') file revealed a list of beneficiaries attached to the petition. The list disclosed that the plaintiff was a daughter of the deceased and had attained the age of majority. The deceased had by will bequeathed two plots of land to the defendant. A grant of LA with the will annexed had been issued to the defendant pursuant to a petition filed by him in 1981. The defendant had been appointed the administrator of the estate of EL but to date no distribution of the estate of EL had been filed. Midway through the trial the defendant abandoned his claim on the five plots of land and the court was called upon to consider the effectiveness of the will in disposing of the two plots of land.

Held, ordering the transfer of only the five plots of land to the plaintiff:

(1) Securing the approval of the Exco did not amount to a transfer proper of the land. A properly executed and attested memorandum of transfer must be presented for registration. Only upon registration would the land vest in the transferee. As the intended transfer did not materialize, EL was competent to devise and bequeath his estate (see pp 71H–72C).

(2) By his will, EL had devised and bequeathed two plots of land to the defendant and the defendant filed a petition for and obtained a grant of LA with the will annexed (see p 72B). Although the plaintiff only became aware of the will and the grant of representation when the statement of defence was served on her in 1983, no steps were taken to have the grant of representation set aside. If the plaintiff had sufficient grounds to set aside the grant of representation, she should have done it by way of a separate action (see p 72E–H).

(3) The effect of a grant of probate or LA would be conclusive evidence of the due execution and validity of the will so long as the grant remains unrevoked. Effect must thus be given to the will (see p 72F–H).

[Bahasa Malaysia summary

Plaintif membuat tuntutan sebagai satu-satunya benefisiari yang masih hidup seorang bernama EL yang merupakan pemilik tujuh plot tanah. Plaintif menuntut bahawa sebelum meninggal, EL telah memperolehi kebenaran jawatankuasa eksekutif negeri untuk memindahmilik tanah tersebut kepada plaintif. Walau bagaimanapun tiada langkah telah diambil untuk menguatkuasa pindahmilik itu. Defendan merupakan anak saudara EL. Defendan mendakwa bahawa plaintif bukanlah anak semula jadi si mati mahupun anak si mati yang telah diangkat secara sah. Hadiah inter vivos yang dikatakan tidak boleh dikuatkuasakan, kerana ia tidak boleh disokong di sisi undang-undang. Suatu pemeriksaan kehakiman ke atas fail surat pentadbiran ('SP') mendedahkan satu senarai benefisiari yang dilampirkan kepada petisyen. Senarai tersebut menunjukkan bahawa plaintif merupakan anak perempuan si mati dan telah mencapai umur majoriti. Menurut satu wasiat si mati telah mewariskan dua plot tanah kepada defendan. Satu pemberian SP dengan wasiat dilampirkan telah dikeluarkan kepada defendan menurut satu petisyen yang difailkan olehnya pada tahun 1981. Defendan telah dilantik sebagai pentadbir harta pusaka EL tetapi sehingga kini tiada pengagihan harta pusaka EL telah difailkan. Semasa perlangsungan perbicaraan, defendan melepaskan tuntutan ke atas lima plot tanah dan mahkamah diminta menimbang keberkesanan wasiat tersebut dalam melupuskan dua plot tanah itu.

Diputuskan, memerintah pindahmilik lima plot tanah kepada plaintif:

(1) Penjaminan kebenaran jawatankuasa eksekutif negeri tidak sama seperti satu pindahmilik sah tanah tersebut. Satu memorandum pindahmilik yang dilaksanakan dan disahkan dengan wajarnya transfer mestilah dikemukakan untuk pendaftaran. Hanya setelah pendaftaran sempurna barulah tanah tersebut dikurniakan kepada pihak yang mana ia telah dipindahmilikkan. Oleh kerana pindahmilik yang diniatkan tidak menjadi kenyataan, EL adalah kompeten untuk mereka dan mewariskan harta pusakanya (lihat ms 71H–72C).

(2) Menerusi wasiatnya, EL telah mereka dan mewariskan dua plot tanah kepada defendan dan defendan memfailkan petisyen dan memperolehi satu pemberian SP dengan wasiat dilampirkan (lihat ms 72B). Walaupun plaintif cuma sedar tentang wasiat tersebut dan pemberian representasi apabila pernyataan pembelaan disampaikan ke atasnya pada tahun 1983, tiada langkah telah diambil untuk mengetepikan pemberian representasi. Sekiranya

plaintif mempunyai alasan yang mencukupi untuk mengetepikan pemberian representasi, beliau seharusnya berbuat demikian melalui satu tindakan berasingan (lihat ms 72E–H).

(3) Kesan satu pemberian probet atau SP akan merupakan bukti konklusif tentang pelaksanaan dan kesahihan wasiat tersebut selagi pemberian tersebut tidak dibatalkan. Justeru itu kesan mestilah diberikan kepada wasiat tersebut (lihat ms 72F–H).]

Notes

For cases on will generally, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2050–2195.

Cases referred to

Frazer v Walker & Anor [1967] 1 AC 569 (PC) (refd)
Whicker v Hume [1858] 7 HL Cases 124 (refd)

Legislation referred to

Adoption Ordinance 1952
Citizenship Rule 1960
National land Code Form 14A
Probate and Administration Act 1959 s 17
Rules of the High Court 1980 O 18 r 13
Wills Ordinance 1959

Wan Mustapha (*Wan Mustapha & Co*) for the plaintiff.
C Jegathesan (*C Jegathesan*) for the defendant.

Idris J: The plaintiff, Tan Chou Me, is the administrator of the estate of his deceased mother Mek Ke Ek d/o Eh Lai. Before her death Mek Ke Ek filed a claim against Eh Pit s/o Chau Sook who is since deceased and is now being represented by Eh Tiang s/o Eh Chan for an order that the deceased Eh Pit s/o Chau Sook who was the administrator of the estate of Eh Lai s/o Cha Chan do transfer the whole of the seven pieces of land as stated below:

Hakmilik	Lot	Mukim	Daerah	Luas	Syarat nyata
GM 1401	108	Selehong North	Terbak	OA 496D	Dusun macam-macam
GM 1521	44	Selehong North	Terbak	OA 295D	Padi
GM 1132	2931	Selehong South	Terbak	OA 613D	Dusun macam-macam
GM 1618	670	Selehong South	Terbak	1A 811D	Padi
GM 888	247	Selehong South	Terbak	0A 342D	Padi
GM 1234	929	Selehong South	Terbak	0A 380D	Padi
GM 417	333	Kelaboran	Tumpat	1A 467D	Padi

to her, being the only surviving beneficiary ie daughter of the deceased Eh Lai s/o Cha Chan. It would appear that Eh Lai before his death had sought and obtained the approval of the Ruler-in-Council (Exco) for the transfer of the said seven lots to his daughter, Mek Ke Ek vide Schedule 'C' to the Malay Reservations Enactment 1930 signed by the State Secretary dated 24 May 1978, but unfortunately no action was taken to effectuate the transfer consequent upon such approval. Eh Lai s/o Cha Chan died on 27 November 1978.

It was alleged by the deceased plaintiff, Mek Ke Ek, that she was in occupation of the said seven pieces of land up to the time of filing the suit. It was further alleged by her that the deceased defendant had wrongfully registered his name as 'Penguasa' and had wrongfully claimed that he was the beneficial owner of all the said lots and that the deceased plaintiff had no further interest or share in the said lands. Consequently, the deceased plaintiff claimed for:

(1) A declaration that she was the owner and entitled to all the said lands.

(2) An order that the said lands be registered in her name, Mek Ke Ek a/p Eh Lai.

(3) Damages and/or costs.

(4) Further or other relief.

On the other hand, the deceased defendant claimed that the said Eh Lai s/o Cha Chan died childless and though the defendant admitted the plaintiff was an adopted child of Eh Lai s/o Cha Chan nevertheless, he maintained that 'the deceased plaintiff was not an adopted child within the meaning and import of the Adoption Ordinance No 41 of 1952'. The defendant averred that although he was the nephew of Eh Lai, he was appointed the administrator of the estate of Eh Lai vide Grant of Letters of Administration No 34 of 1980 by the High Court at Kota Bharu. The defendant also claimed that the puported gift inter vivos granted by Eh Lai to Mek Ke Ek could not be enforced as it was untenable in law. Further the deceased plaintiff, if she was actually in occupation of the land, was in wrongful occupation thereof. Furthermore the deceased Eh Pit s/o Chau Sook in his lifetime as the proper legally constituted representative was in occupation and control of the properties and interests of the estate of Eh Lai s/o Cha Chan viz:

Item	Title	Lot	Mukim	Jajahan	Status
1	1521	44	Selehong North	Tumpat	$^{3}/_{9}$
2	1618	670	Selehong South	Tumpat	$^{1}/_{3}$
3	888	247	Selehong South	Tumpat	$^{1}/_{3}$
4	1234	929	Selehong South	Tumpat	$^{1}/_{2}$
5	1401	108	Selehong North	Tumpat	$^{1}/_{3}$

and that the said Eh Pit s/o Chau Sook was, by transmission, the registered owner of two pieces of land, namely:

Item	Title	Lot	Mukim	Jajahan	Status
1	GM 1132	2931	Selehong South	Tumpat	1/2
2	GM 417	333	Kelaboran	Tumpat	3/9

by virtue of the grant of letters of administration with the will annexed.

Accordingly, the defendant prayed that the claims of the plaintiff be dismissed with costs.

Each side called only one witness to give evidence — the plaintiff himself and a clerk from the High Court Registry.

The evidence of the plaintiff showed that his deceased mother Mek Ke Ek was the natural daughter of Eh Lai s/o Cha Chan and to substantiate his claim he produced a certificate of registration dated 28 November 1963 issued under the Citizenship Rule 1960 which was put in and marked as P1 declaring that from the date thereof Mek Ke Ek d/o Eh Lai was a citizen of Malaya by registration. On the reverse of P1 were particulars relating to Mek Ke Ek showing that she was the daughter of Eh Lai s/o of Cha Chan. The witness also produced a photostat copy of identity card bearing no 390421-03-5022 issued to Mek Ke Ek which was put in and marked as P2 since there was no objection from defence counsel. P2 also showed that Mek Ke Ek was the daughter of Eh Lai.

The witness further told the court the circumstances as to how the titles of the seven pieces of land belonging to Eh Lai happened to be in the possession of Eh Pit. He also informed the court that he was at a certain time working on the lands by planting vegetables thereon but later was prevented from doing so as it was alleged that the lands belonged to Eh Pit who was the administrator of the estate of Eh Lai but unfortunately the witness was not able to identify the lot numbers of the lands in question.

The witness called by the defence was SD1 — Puan Zainun bte Mat Isa, a clerk in the Registry of the High Court, Kota Bharu. She told the court that her duties, amongst others, included taking charge of petitions for the grant of probate or letters of administration and she had access to all these files. She also produced a file relating to a petition for the grant of letters of administration with the will annexed bearing number LA 34/80. The beneficiary under the will was Eh Pit s/o Chau Sook. In the course of hearing I had occasion to refer to the said LA file No 34/80 and found that attached to the petition filed by Eh Pit was a list of the beneficiaries of deceased Eh Lai s/o Cha Chan wherein it was stated that Mek Ke Ek was the daughter of the deceased Eh Lai and she had then already attained the age of majority while the petitioner himself was only a nephew of Eh Lai. When these documents were disclosed to Mr Jegathesan, counsel for the defendant, he promptly requested a short adjournment to take further instructions from his client and when the court resumed hearing, Mr Jegathesan indicated to the court that consequent upon the disclosures he was instructed by the defendant to withdraw the defence but maintain only

A the two lots that were registered in the deceased defendant's name by virtue of the grant of letters of administration with the will annexed dated 20 June 1981. In fact what Mr Jegathesan said was that all the five pieces of land should be transmitted and registered in the deceased plaintiff's name ie Mek Ke Ek d/o Eh Lai while the other two lots namely $^1/_3$ share of Lot 2931 (GM 1132) Mukim of Selehong South, Daerah Terbak, District of Tumpat and B $^3/_9$ share of Lot 333 (GM 417) Mukim of Kelaboran, in the District of Tumpat should remain in the deceased defendant's name. However, the court on its own volition got in touch with the Land Administrator of the District of Tumpat, where the two pieces of land were situated, for copies of the relevant abstracts of title. Upon being supplied with the abstracts, it C was noted that the name of the deceased defendant Eh Pit s/o Chau Sook IC No 1275016 appeared on the register 'sebagai penguasa of $^1/_3$ (6/18) share' in the said lands. It would therefore appear that the claim by the defendant that the two lots were registered in the name of Eh Pit s/o Chau Sook was not true although there was no doubt that the grant of letters of administration with the will annexed dated 14 June 1981 was issued to Eh D Pit as petitioner thereof but to this date no application for an order for distribution of the estate of Eh Lai had ever been filed.

Mr Jegathesan in his submissions questioned the validity of the gifts inter vivos claimed to have been given by the plaintiff's father to her of all the seven pieces of land. No doubt as submitted by counsel the executive E council had given its approval for such transfer but nevertheless no consequential steps were taken to consummate the gifts. Be that as it may, Mr Jegathesan was particularly concerned with the two lots which were devised by the testator in his will dated 7 October 1978 to the deceased defendant. Counsel further submitted that the testator at the time of making the will could devise any of his landed properties without any F hinderance.

On the other hand, Dato' Wan Mustapha, counsel for the plaintiff in his submissions in reply seemed to suggest that the defence counsel was trying to evade the crux of the plaintiff's claim when the defence raised the issue of gift inter vivos, whereas the actual claim as in para 1 of the G statement of claim was that the said plaintiff was the daughter of of Eh Lai s/o Cha Chan and that she was the sole beneficiary of all the landed properties of Eh Lai upon his death which comprised all the seven lots. He submitted that since these two issues were not specifically traversed by the defence they were deemed under O 18 r 13 of the Rules of the High Court 1980 to have been admitted. However, with reference to the statement of H defence, para 1 thereof 'denied the matters in para (1) of the statement of claim; and aver and will aver that the said Eh Lai s/o Cha Chan died childless'. To my mind, and I so held, such defence constituted sufficient traverse for the purpose of the said O 18 r 13.

As indicated earlier midway through the hearing the defendant, due to I certain turn of events, abandoned his entire defence with the exception of the two lots as were devised in the will. In the circumstances, the court was required to consider the extent of the effectiveness of the will.

It will be observed that upon securing the exco's approval the transferor had got over one of the legal requisites to realize his wish but such approval, without more, did not amount to the transfer proper. There ought to be a properly executed and attested instrument of transfer in Form 14A of the National Land Code 1965 and the said instrument must be presented for registration in accordance with the Code. Only upon registration would the titles of the lands divest from the transferor and accordingly vest in the transferee — see the Privy Council decision in *Frazer v Walker & Anor* [1967] 1 AC 569 and also David Wong on *Tenure and Land Dealings in the Malay States* at p 164.

It was not disputed that the will was made some $4^1/_2$ months after obtaining the Exco's approval for the transfer of all the lands from Eh Lai to his daughter Mek Ke Ek and about $1^1/_2$ months before the death of Eh Lai. By the said will the testator devised and bequeathed unto the deceased defendant namely Eh Pit s/o Chau Sook the said two lots and on 11 March 1980, Eh Pit filed a petition for the grant of letters of administration with the will annexed and on 14 June 1981 the letters of administration with the will annexed was granted to the said Eh Pit. As the intended transfer from Eh Lai to Mek Ke Ek never materialized, the proprietorship of all the seven pieces of land continued to remain with Eh Lai and as a corollary he was competent to devise and bequeath his estate to anyone of his choice.

Plaintiff's counsel in the course of his submissions seemed to challenge the legality and validity of the will. He contended that the will was not valid as it was not executed in accordance with the provisions of the Wills Ordinance 1959, especially so when the signature of the testator was not at the proper place. Of more particular concern were the presence of elements of fraud and the suspicious circumstances under which the will was executed. Counsel went on to complain that the defendant never gave any evidence to afford him an opportunity for cross-examination. With respect I must say that if the plaintiff's counsel was mindful of challenging the legality and validity of the will and felt that he had reasonable grounds for doing so, he should have instituted appropriate action the moment when he first came to know of the two lots being willed to the deceased defendant. And it appeared to me that the first time that he came to know of the existence of the will and the letters of administration with the will annexed was when he was served with the statement of defence dated 18 June 1983 but unfortunately, for reasons best known to himself, though I had doubts that it was due to his lackadaisical attitude, no steps were taken to have the grant of letters of administration with the will annexed set aside! In this connection, it had long been held that the effect of the grant of probate and letters of administration with the will annexed would be conclusive evidence of the due execution and validity of the will for so long as the grant remained unrevoked — see para 765 *Halsbury's Laws of England* (4th Ed) Vol 17 and also *Whicker v Hume* [1858] 7 HL Cases 124 at p 143. If in all probability, the plaintiff's counsel felt that he had sufficient grounds for applying to set aside the grant he should have done so by way of a separate action.

Now that the grant of letters of administration with the will annexed remains unrevoked, effect must therefore be given to the will. Section 17 of the Probate and Administration Act 1959 says:

> Section 15 shall apply in the case of grant of letters of administration with the will annexed, in like manner as it applies in the case of a grant of probate; and *in any case where administration with the will annexed is granted the will of a deceased shall be performed and observed in a like manner as if probate thereof had been granted to an executor.* (Emphasis added.)

Relying on the said s 17 I accordingly made the following orders:

(1) the five pieces of land bearing:

> $^{3}/_{9}$ shares of Lot No 44 Mukim Selehong North, Jajahan Tumpat;
> $^{1}/_{3}$ share of Lot No 670 Mukim Selehong South, Jajahan Tumpat;
> $^{1}/_{3}$ share of Lot No 247 Mukim Selehong South, Jajahan Tumpat;
> $^{1}/_{2}$ share of Lot No 929 Mukim Selehong South, Jajahan Tumpat; and
> $^{1}/_{3}$ share of Lot No 108 Mukim Selehong North, Jajahan Tumpat.

were to be transmitted and registered in the name of the deceased plaintiff namely, Mek Ke Ek d/o Eh Lai IC No 390421–03–5022.

(2) the other two pieces:

> $^{1}/_{3}$ share of Lot No 2931 Mukim Selehong South, Daerah Terbak, Jajahan Tumpat;
> $^{3}/_{9}$ shares of Lot No 333 Mukim Kelaboran, Daerah Tumpat, Jajahan Tumpat

were to be registered in the name of the deceased defendant, namely, Eh Pit s/o Chau Sook IC No 1275016.

The plaintiff was also awarded $^{1}/_{2}$ of the taxed costs to be paid out of the deceased defendant's estate with the usual interest at 8%pa from the date of this order until realization.

Order accordingly.

Reported by Andrew Christopher Simon